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In the Supreme Court of the United States
October Term, 1972

No.

Jerry K. Clark, Kenneth L. Gebhart,
William E. Masters, Harold L. Miller,
John E. Murrell, and Ronald K. Williams,
PETITIONERS,

vs

The United States,

Petition For A Writ of Certiorari to the United States Court of Claims

Opinions Below

The opinion of the Court of Claims (Appendix A, *infra*) is not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit in the case of *Jerry K. Clark et. al., vs Dr. Harold Brown, Secretary of the Air Force* is reported in 414 F. 2d 1159. (Appendix B. *infra*). The memorandum-order of the district court in the case of *Jerry K. Clark et. al., vs Dr. Harold Brown, Secretary of the Air Force* (Appendix C, *infra*) is not reported.

Jurisdiction

The judgment of the Court of Claims sought to be reviewed was entered on June 16, 1972, the date of the decision. The jurisdiction of this court is invoked under 28 U.S.C. 1255(1).

Questions Presented

Whether the Court of Claims has jurisdiction under the provisions of 28 USC Section 1491 of claims for damages resulting from the breach of the ready reserve contractual obligation between the petitioners and the Air Force by the illegal recall of petitioners to active duty by the Air Force after the termination of the Ready Reserve Agreement.

2. Whether the Court of Claims has jurisdiction under the provisions of 28 USC Section 1491 of claims for damages resulting from the failure of the Air Force to adhere to and abide by its own statutes and regulations in regard to its obligations to members of the ready reserve component who had completed their military service and reserve requirements and who had become members of the Ready Reserve by execution of a Ready Reserve Agreement.

3. Whether the Court of Claims has jurisdiction under the provisions of 28 USC Section 1491 of claims for damages resulting from the taking of tangible and intangible personal property by the Air Force in violation of the 5th Amendment by illegally and improperly forcing the petitioners from their civilian employments into extended periods of active military service.

4. Whether the Court of Claims has jurisdiction under the provisions of 28 USC Section 1491 of claims for damages resulting from the subjection of petitioners to involuntary servitude by the Air Force in violation of their rights under the 13th Amendment by forcing them to illegally and improperly perform military service after they had completed all military service obligations and after their agreement for additional service had expired.

Constitutional Provisions Statutes, Ordinances and Regulations Involved

Amendment V, U.S. Constitution
Amendment XIII, U.S. Constitution
10 USC Section 296 (a) (b) (c) (e) (f) and (g)
10 USC Section 674
10 USC Section 672
28 USC Section 1491

Public Law 89-687, Para E. of Title I of 1967 Appropriation Act (80 Stat 981)

Air Force Manual 35, Chapter 1, Section 1-1 Air Force Manual 35-3, para 2

The relevant portions of the above provisions are set forth in Appendix D *infra*.

Statement of the Case

The six (6) petitioners herein, the plaintiffs below in the Court of Claims, had all variously been members of the Air Guard Units of Kansas, New York, and Ohio. These Air National Guard units were all part of the reserve components of the United States Air Force and membership in the State Air Guard Unit, by its terms, also meant membership in the Air Reserve Forces.

Each of the petitioners had already, at some time prior to January 26, 1968, completed his military service obligations and all of his statutory reserve obligations. In each instance the petitioner's membership in the Air Guard Unit was voluntary and contractual, and was obtained and thereafter retained by the execution of a "Ready Reserve Agreement" (AF Form 1051, Appendix E *infra*) for obligation for a specific period of time, normally one year.

Each petitioner, upon entrance to his respective Air National Guard Unit, had executed a Ready Reserve Agreement, but in each instance the period of time prescribed in the agreement had expired before the call up by the Secretary of the Air force on January 26, 1968, and each petitioner had specifically refused to renew his agreement or to authorize the continuation of his contractual status as a member of the Ready Reserve.

Air Force regulations than applicable, promulgated by the Secretary of Air Force in Air Force Manual 35-3, paragraph 39-7, subparagraph c(2), (a) and (c) required a review of Ready Reserve Units personnel records once each fiscal year and the completion of a new "Ready Reserve Agreement" for each member of the unit. These regulations further provided that if a member did not renew his contract or agreement (as was the case with each of the petitioners) that he be immediately reassigned to the Standby Reserve by the Air Force without further action or request on his part.

Despite the efforts by the individual petitioners to sever their connections with the Ready Reserve and not withstanding the Air Force's own requirements no change was made in the official reserve status of the petitioners and the Air Force,unknown to petitioners, continued to improperly maintain them as members of the Ready Reserve component, subject to all of the obligations of such classification. (For various reasons some of the petitioners continued to attend drills after the termination of their contracts, but contrary to the specific statements made by the Court of Claims in their decision below, this was definitely not true of all of them. Petitioner Williams, for example, notified the Kansas Air National Guard of his desire to be processed out of the unit and retained discharge clearance dated August 17, 1967. He cleared his National Guard Unit on October 27, 1967 and completed all out-processing requirements by that time. He had not further contact of any kind with the unit until January 26, 1968, when ordered to active duty.)

This was the situation then on January 26, 1968, after the so-called "Pueblo Incident", when the Secretary of the Air Force, under the authority of Public Law 89-687, issued special orders activating each of the Air Guard Units herein, and, in effect recalling each of the petitioners to an extended active duty status which resulted in all of them being sent overseas, some to combat zones.

The petitioners objected immediately but were threatened with courts-martial if they did not proceed as ordered. They then sought individually to obtain their releases from active duty through Air Force channels, asserting the expiration of their Ready Reserve Agreements, but these requests were eventually and ultimately denied by the Air Force Chief of Staff.

The petitioners (with the exception of Mr. Miller) then sought a declaratory judgment from the U.S. District Court for the District of Columbia (Civil Action No. 1435-68), declaring that their further retention on active duty in the United States Air Force was improper and seeking an order directing their immediate release. This action was commenced in June 1968 and after various proceedings for preliminary injunctive relief had been largely unsuccessful, a motion for summary judgment was filed in October 1968.

[In that case the Air Force took the position that the petitioners had not taken all the necessary steps to effect their

releases from the Ready Reserve, that they must, in addition to everything else, make application for transfer to the Standby Reserve. By the time the case was in the Court of Claims two years later, the Air Force was characterizing its conduct as only "an alleged administrative error" in failing to transfer petitioners to the Standby Reserve.]

On March 26, 1969, the District Court, Judge Gasch, held in favor of petitioners and against the Air Force (*See* Appendix C, *infra*) and found that the purpose of The Ready Reserve Agreement and the relevant regulations was that:

> "... The government wished to have each Ready Reservist under a contract which would assure his availability for at least one year. If a Ready Reservist refused or neglected to renew his Ready Reserve contract, he would immediately be transferred to Standby by the appropriate personnel officer. This would result in a definite list of Air Force personnel under current contract to respond in the time of need."

and further:

> "...Since the regulation requires immediate transfer of the reservist in question to Standby by action of Air Force personnel ... the Government cannot rely on its own inaction and failure to perform under applicable regulations."

The judgment of the District Court dated April 4, 1969 ordered the immediate release of petitioners from active duty and their immediate assignment to the Standby Reserve. The Air Force, however, obtained a stay of proceedings and appealed the decision to the Court of Appeals for the District of Columbia who affirmed, *per curiam* in a decision rendered on May 29, 1969. (Appendix B, *infra*). The Court noted that

> "... when they were asked on the occasion of their annual military personnel record review, to renew or extend their agreement to stay in the Ready Reserve, they declined to do so. Since plaintiffs already had the requisite military service specified by regulations they were entitled to terminate their Ready Reserve status ... We agree with the reasoning of Judge Gasch that this operated to transfer plaintiffs outside the group of members who were subject to call up as members of the Ready Reserve."
>
> "This construction is fortified by the fact, which we have ascertained on further inquiry, that the standard

Ready Reserve agreement prescribed by regulations only obligates the member to stay in the reserve for the period expiring with his annual military personnel record review . . ."

A final order was then issued by the District Court for The District of Columbia on August 8, 1969, declaring that the retention of the petitioners in the Ready Reserve of the United States Air Force on and after January 26, 1968, and the call of the petitioners to active duty on that date to be unlawful and improper and further declaring that at all times subsequent to the expiration of their respective Ready Reserve Agreements each petitioner was entitled to be and should have been transferred to the Standby Reserve and considered a member of the Standby Reserve.

By this time petitioners, Clark and Masters, had already been administratively released because of hardship and dismissed from the lawsuit, so the judgment technically only affected the remaining petitioners, Gebhart, Murrell, and Williams, who at that time were still on active duty, although themselves very close to normal release.

Thereafter this present action was commenced in the Court of Claims for the damages sustained by each petitioner by virtue of the actions of the Air Force and the illegal recall to active duty. The jurisdiction of the Court of Claims was sought under the provisions of 28 U.S. Code 1491 and the claims were based upon the failure of the Air Force to abide by the terms of the contractual agreement with petitioners to release them from the Ready Reserve and to reassign them to the Standby Reserve at the designated time, the failure of the Air Force to abide by its own regulations promulgated to cover such situations, the taking of both tangible and intangible personal property by the Air Force in violation of the 5th Amendment, and the forcing of petitioners to involuntarily and illegally perform services for the Air Force in violation of the 13th Amendment.

The Air Force moved for summary judgment alleging that petitioners' claims sounded in tort and that the prior declaratory judgment action in the District Court somehow constituted an improper "splitting" of the cause of action which now deprived the Court of Claims of jurisdiction.

After the petitioners themselves cross-moved for summary judgment on the issue of liability alleging that the jurisdiction of the Court was clear, the Air Force attempted to reassert their

tort allegations in various forms and to even relitigate the propriety of the call-up itself which had previously been decided against them by the Court of Appeals.

After arguments on the motions in April, 1972, the Court of Claims issued its decision on June 16, 1972 granting the motion of the Air Force for summary judgment, denying the cross-motion of petitioners, and dismissing the petition for damages.

The Court of Claims apparently has held that there was no contract between the parties, but only a "consent" by petitioners to accept service in time of emergency, which apparently imposed no obligations on the Air Force. The Court also argued that even if there were a contract it had terminated three (3) months before the call up to active duty so that the actions of the Air Force were not a breach at all, but merely a violation of regulations.

The Court concluded that the petitioners' claims sound in tort and that the Court of Claims was, therefore, without jurisdiction. The Court also concluded, without explanation, that there was no taking of property within the meaning of the Fifth Amendment and no involuntary servitude in violation of the 13th Amendment.

It is from this decision and the consequent judgment that the petitioners now seek from this Supreme Court a writ of certiorari to the Court of Claims.

Reasons for Granting The Writ

In the initial stages of this litigation in the district courts, when the petitioners were merely seeking to obtain their releases from active duty, the issue before the Courts was not the existence of a contract at all, but instead the interpretation of that contract as to its duration and the means of cancellation. From the briefs and arguments submitted at that time and from the comments of the Court, it is apparent that the parties conceded that the relationship was contractual and disputed only how that relationship was to be terminated.

The Air Force took the position that, in view of the existing statutes and regulations, the individual seeking a release must not only refuse to renew the contractual obligation, he must also apply for a transfer to the Standby Reserve. The District Court Judge, Gasch, rejected that argument and found

that the contract terminated on the occasion of the individual's annual personnel records review and that the ready reserve commitment, *which was contingent upon that contract*, terminated also and the individual was effectively restored to the Standby Reserve as of that date.

After examining the Ready Reserve Agreement, the pertinent statutes, and the regulations promulgated by the Air Force, Judge Gasch concluded that the only logical and consonant explanation for the whole scheme was that the government wished to have each Ready Reserve under a *contract* which would assure his availability for at least one year. This would provide the Air Force with a definite list of personnel *under current contract* to respond in time of need.

This reasoning was specifically reaffirmed and adopted by the Court of Appeals for the District of Columbia Circuit in their *per curiam* opinion of May 29, 1969, dismissing the appeal of the Air Force.(414 F. 2d 1159), The Court pointed out and emphasized that the standard Ready Reserve Agreement only obligates the member to stay in the reserve for the period expiring with his annual military personnel record review and if he does not renew his agreement, he terminates his ready reserve status and is immediately reassigned to the Standby Reserve.

Despite these prior decisions and in stark contrast to them, the Court of Claims, in the decision below, found that there was no contract at all and, as a consequence, that they had no jurisdiction of the petitioners' claims, which they eventually concluded sounded in tort.

The Court also found that there was no obligation in the agreements for the Air Force to transfer the petitioners to the Standby Reserve, particularly when the petitioners never requested such transfers.

We simply cannot accept this reasoning. The Air Force itself drafted the form Ready Reserve Agreement and they are ones who utilized the term "agreement". Until the issue of contract became paramount in determining Court of Claims' jurisdiction, there was never any question about the existence of a contractual relationship. And if the Air Force felt that it was necessary to spell out the individual's obligations and the duration of such obligations in specific contract form it should be abundantly clear, that in the absence of such contract, the Air Force felt that no obligations of any kind existed. Similarly

when the term of the contract agreement expired, the relationship terminated. The Ready Reserve Agreement was not a gratuitous promise by these petitioners to serve, but a contract with the Air Force to be available for a specific period of time *and no longer*.

It is clear that every action taken by the Air Force in relation to the petitioners, for which damages are now sought, was predicated totally upon the authority conferred by the contract agreement, or at least upon the Air Force's interpretation of that authority, and the recent suggestion in the brief in the Court of Claims, that it was only "an alleged administrative error" is simply incredible.

Any contract is written in the context of the applicable law. The Uniform Commercial Code, Section 1 - 201 (1952), for example, declares that "contract means the total obligation in law which results from the parties' agreement as affected by this Act, and any other applicable rules of law." As Professor Corbin explains: "This definition points to the sum total of the legal relations created by the acts of agreement..." *Corbin On Contracts,* Volume 1, Chapter 1, Section 3 at Page 7 (1963 Edition).

The regulations promulgated by the Air Force relative to the Ready Reserve are part of the context of the law in which the actual written agreement must be viewed. The service is bound by its own regulations and the failure by the Air Force to so comply with such regulations is an error of law, *Vitarelli v. Seaton* 359 U.S. 535 (1959); *Service v. Dulles* 354 U.S. 363 (1957). The meaning of the ready reserve "contract" is not just derived from the written agreement alone, which was the approach apparently followed by the Court of Claims below, but from the "contract" as the total obligation in law resulting from all the applicable rules of law existing at that time, including the Air Force regulations and the various statutes. This was precisely the approach followed by the District Court when it determined that the contract had terminated.

Nor are the independent regulations governing the contractual relationship of significance, unless and until the relationship in fact exists. The Court of Claims, while finding that the regulations were violated, denied that there was ever a relationship to which they might apply.

The Court characterized the conduct of the Air Force as sounding in tort, as acts or omissions in the exercise of a statute

or regulation. This would seem to be an effort to focus on the manner of the breach of the contractual obligation rather than on the obligation itself.

For the purposes of the Court of Claims' jurisdiction, it should not matter how the breach of contract occured, only that it occured. The Court of Claims itself has repeatedly stated that an action may be maintained which arises from the breach of a contractually created duty, even though the damages sustained by the plaintiffs may have resulted from the negligent acts of the defendant.

In *Bird & Sons Inc. v. United States* 190 Ct Cl 426, 420 F. 2d 1051 (1970), for example, the Court allowed a claim for damages resulting from the negligent operation of a concrete mixer truck because it was the result of the negligent manner in which the defendant performed its contract. The Court emphasized that: "... where an alleged 'negligent' act constitutes a breach of a contractually created duty, the Tucker Act (28USC Section 1492) does not preclude relief." To the same purpose, see also *Fountain v. The United States and Redevelopment Land Agency* 192 Ct Cl 495, 427 F. 2d 759 (1970); *Burtt v. United States* 176 Ct Cl 310 (1966); and *Chain Belt Company v. United States* 127 Ct Cl 38 (1953).

The apparent underlying basis of the Court of Claims reasoning in their decision below is that the violation of a regulation is only a tort, and that the Court does not have jurisdiction of tort claims. Despite the fact that the Tucker Act (28 USC Section 1491) specifically grants jurisdiction for claims "founded... on any regulation of an executive department," the Court has consistently held that the alleged improper application of regulations and the alleged abuse of discretion by an agency in exercising its regulatory function are non-compensible. See *Mosca v. United States* 189 Ct Cl 283, 417 F 2d 1382 (1969) and *Eastport Steamship Corp. v. United States* 178 Ct Cl 599, 372 F. 2d 1002 (1967).

Eastport, supra, is perhaps the most eloquent statement of this position and it is seemingly more than coincidental that it was cited by the Court for the proposition of tort jurisdiction. (See *Decision*, Appendix A, *infra*)

But this is not a situation where the complaining party has suffered financial detriment because his license or application was improperly denied pursuant to regulations having nationwide application. These regulations are not a part of a

statutory regulatory role. Instead, they detail and define the procedures by which the Air Force will implement the creation of its Ready Reserve component and they supplement or "flesh out" the plain language of the Ready Reserve Agreement by explaining its meaning in the whole statutory scheme. The regulation does not exist independent of the ready reserve relationship and cannot be violated unless the agreement creating that relationship is violated.

The Court of Claims has held that no "contract" in fact existed. But they argue, also, in the decision that even if there were a contract it had terminated three (3) months before the recall to active duty so it was therefore not breached. This simply begs the question. The point is that the only time the petitioners could be recalled to active duty was during the existence of the agreement. After it terminated, they were not only immune from recall, but they were automatically transferred to the Standby Reserve.

The Air Force has never even suggested that the petitioners could or would be recalled if they were not under contract to the Ready Reserve. The whole point of the first lawsuit was to determine if the agreements had terminated and the Courts found that they had and ordered the petitioners to be released immediately. To suggest now that even members of the Standby Reserve could be arbitrarily recalled to active duty at the whim of the Air Force with total impunity is simply unconscionable.

The Court of Claims found no merit to the petitioners' claim that there has been a taking of their property in violation of the 5th Amendment. But man's labor is his property, as well as the right to possess, use, and dispose of it. When there is a taking of such property from the owner by public authorities for the purpose of public use, the constitutional obligation to make just compensation arises. This would be particularly true where the taking was accomplished in an arbitrary, oppressive, and capricious manner without legal authority.

The Air Force has consistently asserted that since the petitioners received proper pay and allowances while on active duty, they have nothing else coming. But when there is a taking of private property for public use, the value of the property is not the value to the government but the loss to the party affected *Bauman v. Ross* 167 U.S. 548, 574. For all that the government takes it must pay and that includes not only the value of the part taken, but also the injury to the part not taken *United States v. Dickinson* 331 U.S. 745 (1947).

The Court of Claims further found that the petitioners were not subjected to involuntary servitude in violation of their rights under the 13th Amendment. This was apparently predicated on the fact that as commissioned officers they accepted their appointments for an indefinite term. But by doing so petitioners certainly did not accept or agree to an indefinite term of active duty nor to an arbitrary or illegal recall to active duty when the Air Force or even the President so chose.

Members of the Standby Reserve may only be involuntarily ordered to active duty in time of war, or national emergency declared by Congress, or when otherwise authorized by law. None of these conditions was met in the instant situation.

The 13th Amendment was neither intended to reduce the duties of citizens nor to deprive the government of its war powers, nor its powers for national defense. *Butler v. Perry* 240 U.S. 328 (1916). Compelled military service is neither repugnant to a free government nor in conflict with the constitutional guarantees of individual liberty. The citizen has a duty to render military service in time of need, and the government has a right to compel such service. *Arver v. United States* 245 U.S. 366 (1918).

But when the means chosen to effectuate the public interest are unreasonable or when the duties imposed are arbitrarily enforced even in violation of the statutory schemes adopted by the government, then those duties no longer exist and the government's rights terminate.

Military service under such circumstances becomes enforced, compulsory service and the subjection of one person to the will of another by threat of overpowering force. We do not question the initial obligations of the citizen to his government, but where that obligation is inequitably and unfairly applied in violation even of the government's own rules; when, as here, the citizen is forced to illegally serve, then he should be permitted to have recourse against the government for all the damages he sustains.

Conclusion

In a recent law journal symposium the Court of Claims was described as a "unique and permanent contribution" to American government and as the final protection for the citizen against arbitrary action, discrimination or oppression at the hands of the government or government officials.

The petitioners herein were all officers in the Air Force Reserve, who have already in a separate case been found to be illegally and improperly recalled to active duty, who were sent overseas, some to combat zones, and who spent over a year and a half on active duty while litigating in the Courts their rights to be released all at considerable individual expense to them.

They have now sought damages from the Air Force for their illegal recall and the Court of Claims has determined that not only does it not have jurisdiction, but, in effect, no recourse of any kind exists for them. The Court's decision seemingly conflicts with the prior decisions of the District Court and the Court of Appeals in its analysis of the situation which existed here and presents significant and important issues which should now be decided by this Supreme Court.

It is, therefore, respectfully submitted that certiorari should be granted.

David H. Bodiker
Columbus, Ohio

Dwight A. Teegardin
Columbus, Ohio

Counsel for petitioners

September, 1972

APPENDIX A

In the United States Court of Claims

No. 449-70
(Decided June 16, 1972)

JERRY K. CLARK, KENNETH L. GEBHART, WILLIAM E. MASTERS, HAROLD L. MILLER, JOHN E. MURRELL, AND RONALD K. WILLIAMS v. THE UNITED STATES

David H. Bodiker for plaintiffs. *Dwight A. Teegardin,* attorney of record.

Charles M. Munnecke, with whom was *Assistant Attorney General L. Patrick Gray, III,* for defendant.

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, and KUNZIG, *Judges.*

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge,* delivered the opinion of the court:

The plaintiffs, Jerry K. Clark, Kenneth L. Gebhart, William E. Masters, Harold L. Miller, John E. Murrell, and Ronald K. Williams, have filed this suit against the United States claiming damages in the total sum of $263,935.40 for an alleged breach of contract. We have concluded that the plaintiffs are not entitled to recover. The facts are basically as follows. The plaintiffs were members of the Air National Guard with membership in the Reserve components of the United States Air Force. Each of them had executed a Ready Reserve Agreement as follows:

READY RESERVE AGREEMENT

I agree to (accept) or (retain) membership in the Ready Reserve for a period to expire on the date of my first annual Military Personnel Record Review (or the date of expiration of my enlistment whichever comes earlier), following the effective date of this agreement.

I certify that I am immediately available for extended active duty (1 in time of war or National emergency declared by Congress; (2)in a National emergency declared by the President, or (3)when otherwise authorized by law. I understand the Air Force can in the event of partial or full mobilization, order me to enter active military service at any time during the period of this agreement. I am fully aware of my eligibility for Standby status under chapter 39, AFM 35-3, and during the period of this agreement, hereby waive my rights to Standby status under any criteria for which I am presently eligible. I understand that:

a. I will not be released from this agreement unless there is a change in my status, and upon such change, I submit a request for transfer to the Standby Reserve and such request is approved under the eligibility criteria established in chapter 39, AFM 35-3.

b. No request for transfer to the Standby Reserve will be accepted after the date of an alert or notice of mobilization.

c. This agreement will become effective on the date indicated above or the date I am officially assigned whichever comes later.

d. This agreement terminates upon reassignment from the *Kansas Air National Guard.*

Signature of Member
(Signed)

These agreements expired prior to January 26, 1968. The plaintiffs refused to execute new agreements but continued to serve in a Ready status, reported for drill, received pay and allowances therefor, and acquired points for retirement after their agreements had terminated. All of them were called to active duty on January 26, 1968, and served in such capacity until they filed suit in the United States District Court for the District of Columbia seeking release from active duty. Judge Gasch of that court ordered the plaintiffs released from active duty because of the provisions of Air Force Manual 35-3, paragraph 39-7, subparagraph c (2) (a), which provides in effect for an annual screening to be made of personnel in the Ready Reserve, and if the reservist's Ready Reserve Agreement expires on the date of the interview or within 12 months thereafter, the

reservist will be required to execute a new agreement. If he does not renew his agreement, he will be immediately assigned to the Standby Reserve. This regulation was not followed in this case, and the plaintiffs were released from active duty by order to the District Court.[1]

Thereafter, the plaintiffs filed this suit claiming damages for lost wages, retirementcredits, job experience and training, employment and advancement opportunities, loss of the society of their families, involuntary risk of their lives, deprivation of property in violation of the 5th Amendment to the United States Constitution, and involuntary servitude in violation of the 13th Amendment to the Constitution. The defendant filed a motion for summary judgment, and the plaintiffs filed a cross-motion for summary judgment.

The main thrust of plaintiffs' claims is that the foregoing damages resulted from a breach of the Standby Agreement by the government. This contention is without merit for several reasons. The agreement was not signed by the government. It was more in the nature of a consent by plaintiffs to accept active service in time of emergency and a waiver on their part of their rights to Standby status during the period of the agreement. Even if it could be said that the government became bound by its acceptance of the agreement, a careful reading of the document shows that it imposed no obligation on the government. The plaintiffs say that the Air Force should have transferred them to the Standby Reserve at the end of their agreements because of the provisions of the agreements. We find no such obligation in the agreements, especially in view of the fact the plaintiffs never requested a transfer to the Standby Reserve.

Even if it could be said, arguendo, that the agreements imposed obligations on the Air Force, the plaintiffs have no claim for breach of contract because the agreements terminated by their own provisions more than three months before the plaintiffs were called to active duty. In other words, the events of which plaintiffs complain occurred long after their Standby Agreements had expired. Therefore, the action taken by the Air Force was not a breach of the terminated agreements.

It is clear that the claims of the plaintiffs sound in tort. They are based on the violation of the above-cited regulation by the Air Force. This court does not have jurisdiction of tort claims. *See* U.S.C.Section 1491; *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967).

[1]This decision was affirmed by the U.S. Court of Appeals for the D.C. Cir. on May 29, 1969 (414 F. 2d 1159)

There is no necessity for us to transfer this case to a District Court because the Tort Claims Act, 28 U.S.C. Section 2680, expressly prohibits suits against the United States on:

> Section 2680. Exceptions.
>
> The provisions of this chapter and section 1356(b) of this title shall not apply to
>
> (a) Any claim based upon an act or omission of an employee of the Goverment, exercising due care, in the execution of a statute or regulation, * * *

It is fundamental that the government has sovereign immunity from suits unless such immunity has been waived by an Act of Congress. It cannot be sued without its consent. *See United States v. Shaw, 309* U.S. 495 (1940) and *United States v. Sherwood,*312 U.S. 584 (1941). There is no such consent with respect to plaintiffs' claims in the case before us.

There is no merit to plaintiffs' claims that the government has deprived them of their property in violation of their rights under the 5th Amendment to the Constitution. They have not shown that the government has taken any of their property within the meaning of the 5th Amendment.

Furthermore, the plaintiffs have failed to show that the government subjected them to involuntary servitude in violation of their rights under the 13th Amendment to the Constitution. They were commissioned Reserve officers appointed by the President in accordance with 10 U.S.C. Section 593 for an indefinite term. They accepted the appointments, served on active duty, and were paid for their service. They served during the pleasure of the President, as provided by the statute. Under these circumstances, there was no involuntary servitude. In any event, such a claim sound in tort and cannot be considered by this court.

In view of the conclusions we have reached as set forth above, it is unnecessary to consider other contentions made by the plaintiffs and the defendant.

The defendant's motion for summary judgment is granted and the cross-motion of the plaintiffs is denied, and the plaintiffs' petition is dismissed.

APPENDIX B

United States Court of Appeals
For The District of Columbia Circuit

No. 22,906
Jerry K. Clark, et al.,
v.
Dr. Harold Brown,
Secretary of the Air Force,
Appellant

On Appellant's Motion for Summary Reversal
and Appellees' Motion for Summary Affirmance

Decided May 29, 1969

Mr. Robert E. Kopp, Attorney, Department of Justice, with whom Mr. Morton E. Hollander, Attorney, Department of Justice, was on the motion for appellant. Messrs. David G. Bress, United States Attorney at the time the motion was filed, and Frank Q. Nebeker, Assistant United States Attorney at the time the motion was filed, entered appearances for appellant.

Mr. John II Heise, Jr., with whom Mr. Thomas H. King was on the motion, for appellees.

Before BAZELON, Chief Judge, LEVENTHAL and ROBINSON, Circuit Judges.

PER CURIAM: This case involves the question whether plaintiffs, appellees in this court, are members of the Ready Reserve of the Air Force or the Standby Reserve. When they were asked, on the occasion of their annual military personnel record review, to renew or extend their agreement to stay in the Ready Reserve, they declined to do so. Since plaintiffs already had the requisite military service specified by regulations, they were entitled to terminate their ready reserve status. As District Judge Gasch pointed out in his opinion, the pertinent Air Force regulations provide expressly: "If at that time [annual military personnel record review]the member does not renew his Ready Reserve Agreement, he will be immediately reassigned"1 to the Standby Reserve. We agree with the reasoning of Judge Gasch that this operated to transfer plaintiffs outside the group of members who were subject to call up as members of the Ready Reserve.

This construction is fortified by the fact, which we have ascertained on further inquiry, that the standard ready reserve agreement prescribed by regulations only obligates the member to stay in the reserve for the period expiring with his annual military personnel record review. The government argues that the Air Force regulations are for the benefit of the Air Force not the members of the reserve; that the undertaking of the Air Force to transfer the member to the standby reserve is not self-executing and he must also make application therefor. We attach no decisive consequence to the fact that the members' position was not set forth in a formal writing Their oral statements came at a (time) of undoubted significance to all concerned, the occasion of the annual Military Personnel Record Review prescribed by regulation pursuant to statutory provision, *see* 10 U.S.C. Section 271 (1964). That is enough. These members of the Ready Reserve are entitled to be treated as though the Air Force had complied with its own regulations, including the procedures provided for obtaining the consent of the governor to the transfer to the standby reserve.

Affirmed

[1]Air Force Manual 35-3, para. 39-7 (c)(2)(a).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JERRY K. CLARK. ET AL.,
Plaintiffs,

v

DR. HAROLD BROWN,
Defendant.

Civil Action

No. 1435-68

MEMORANDUM-ORDER

This matter came on for hearing on cross motions for summary judgment. It appears that there is no genuine issue as to any material fact.

Plaintiffs in this case are Air National Guard officers, all of whom have previously served on active duty for period in excess of five years and all of whom were called to active duty following the Pueblo incident. They contend that this call to active duty was unlawful in that it was based on their erroneous classification in the Ready Reserve. Their position is that upon their refusal to renew a continuation of their contractual status as members of the Ready Reserve, they should have been immediately transferred by applicable procedures under pertinent regulations to the Standby Reserve.

The Government takes the position, however, that when an Air National Guardsman is a member of the Ready Reserve, he must take two steps to effect his release from the Ready Reserve. First he must refuse to renew his contractual obligation to continue in the Ready Reserve, and second, he must apply for a transfer to the Standby Reserve. The Government concedes plaintiffs took the first step but states that the second step was taken only after these plaintiffs received a call to active duty. The Government also relies upon 10 U.S.C. Section 269(g), which provides that a member of the Air National Guard of the United States may be transferred to the Standby Reserve only with the consent of the Governor of the state concerned.

The regulation on which particular reliance is placed by the remaining plaintiffs, Gebhart, Murrell, and Williams (the

Government having administratively granted relief to plaintiffs Clark and Masters) is contained in Air Force Manual 35-3, as amended. Paragraph 39-7, subparagraph c.(2)(a) related to review of unit personnel records and provides that the base personnel office or the custodian of the records shall require personnel not on extended active duty who are assigned to Ready Reserve units to review their unit personnel records in accordance with certain schedules. This review is required once each fiscal year. Subsection (c) provides that during each such review the custodian of group records will review the reservist's Ready Reserve Agreement required by Chapter 32 and if the agreement expires on the date of interview or will expire within the next 12 months after the date on which the records review is being conducted, he will require the reservist to complete a new Ready Reserve agreement during the interview. Subparagraph (2)(a) states that if at that time the member does not renew his Ready Reserve agreement, he will be immediately reassigned to Standby.

Without this regulation the Government would prevail. It appears, however, that the Government's argument that the reservist himself must take action to seek transfer from the Ready Reserve to the Standby Reserve is not in accordance with the plain meaning and effect of this Air Force Regulation, a copy of which has been filed with the pleadings in this case.

When consideration is given to this regulation, a question arises as to whether the regulation can be read in harmony with the law itself, 10 U.S.C. Section 269. In this connection, it must be assumed that the Secretary had a reason for including this regulation in the Air Force Manual. The obvious reason is that the Government wished to have each Ready Reservist under a contract which would assure his availability for at least one year. If a Ready Reservist refused or neglected to renew his Ready Reserve contract, he would immediately be transferred to Standby by the appropriate personnel officer. This would result in a definite list of Air Force personnel under current contract to respond in the time of need. No other explanation has been advanced. This explanation is both logical and consonant with the statutory scheme. Under familiar principles, the Secretary is bound by his own regulation. *Roberts v. Vance,* 119 U.S.App.D.C. 371, 343 F.2d 236 (1964); *Service v. Dulles,*

354. U.S. 363 (1957). The remaining question is whether transfer to Standby required by the Secretary's regulations on plantiffs' refusal or neglect to renew their contracts should be regarded as ineffectual because of 10 U.S.C. Section 269(g), which requires the consent of the Governor of the state. Since the regulation requires immediate transfer of the reservist in question to Standby by action of Air Force personnel, the Court believes that the logical interpretation of this regulation with respect to the Governor's consent is that the Air Force should take the necessary steps to effect the consent. This cannot be done under these circumstances by doing nothing. There is no showing here that any steps were taken pursuant to the regulation. The Government cannot rely on its own inaction and failure to perform under applicable regulations.

Plaintiffs' motion for summary judgment is granted. Defendant's motion is denied.

Order accordingly.

/s/Oliver Gasch
Judge

Date: March 26, 1969

APPENDIX D

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V provides in pertinent part:

"" . . . nor shall any person . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIII provides in pertinent part:

"Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

STATUTES INVOLVED

10 U.S.C. 269 provides in part:

Section 269. Ready Reserve: placementt in; transfer from

"(a) Each person required under law to serve in a reserve component shall, upon becoming a member, be placed in the Ready Reserve of his armed force for his prescribed term of service, unless he is eligible to transfer to the Standby Reserve under subsection (e).

"(b) The units and members of the Army National Guard of the United States and of the Air National Guard of the United States are in the Ready Reserve of the Army and the Ready Reserve of the Air Force, respectively.

"(c) All Reserves assigned to units organized to serve as units and designated as units in the Ready Reserve are in the Ready Reserve.

"(e) Except in time of war or of national emergency declared by Congress, a Reserve who is not on active duty, or who is on active duty for training, shall, upon his request, be transferred to the Standby Reserve for the rest of his term of service, if

"(1) he served on active duty (other than for training) in the armed forces for an aggregate of at least five years;

"(2) he has served on active duty (other than for training) in the armed forces for at least

one year and has served satisfactorily as a member of a unit of the Ready Reserve after being transferred under section 1014(a) of the title 50, for a period that, when added to the period of his active duty, totals four years;

"(3) he has satisfactorily completed an enlistment under section 1014(b) of that title;

"(4) he served on active duty (other than for training) in the armed forces for an aggregate of less than five years, but satisfactorily participated, as determined by the Secretary concerned, in an accredited training program in the Ready Reserve for a period which, when added to his period of active duty (other than for training), totals at least five years, or such shorter period as the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, may prescribe for satisfactory participation in an accredited training program designated by the Secretary concerned;

"(5) he served on active duty (other than for training) in the armed forces for an aggregate of at least 12 months after December 6, 1941, and before September 3, 1945, and for an aggregate of at least 12 months after June 25, 1950; or

"(6) he was a member of one or more reserve components for an aggregate of at least eight years after September 2, 1945.

"This subsection does not apply to a member of the Ready Reserve while he is serving under an agreement to remain in the Ready Reserve for a stated period. (Emphasis added)

"(f) Subject to subsection (g), a member in the Ready Reserve may be transferred to the Standby Reserve or, if he is qualified and so requests, to the Retired Reserve, under such regulations as the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, may prescribe.

"(g) A member of the Army National Guard of the United States or the Air National Guard of the United States may be transferred to the Standby Reserve only with the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal

Zone, or the District of Columbia, whichever is concerned. Aug. 10, 1956 c. 1041, 70A Stat. 12; Sept. 2, 1958, Pub. L. 85-861, Section 1(4), 72 Stat. 1437."

10 U.S.C. 674 provides in part:

"(a) Units and members in the Standby Reserve may be ordered to active duty (other than for training) only as provided in section 672 or this title."

10 U.S.C. 672 (referred to in 674) provides in part:

"(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However * * *

"(2) a member of the Standby Reserve may not be ordered to active duty under this subsection unless the Director of Selective Service determines that the member is available for active duty."

Public Law 89-687, Para. E. of Title I of the 1967 Appropriation Act (80 Stat. 981) provides in part:

"Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months."(Emphasis added)

28 U.S.C. 1491 provides in pertinent part as follows:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

REGULATIONS INVOLVED

The applicable regulations are issued pursuant to Title 10 of the United States Code and are found in the Air Force Manual 35. Chapter 1, Section 1-1 of the Manual provides:

"1-1 Applicability. This manual applies to all members of the Air Reserve Forces (Air National Guard and Air Force Reserve) unless otherwise stated. It further applies to all major commands or subordinate units having responsibility for units or individuals of the Air Reserve Forces. All reference to units and individuals of the Air National Guard pertain, and are restricted, to those organizations and personnel having Federal recognition. *Except as provided herein, no waiver or exception may be granted to the provisions of this manual without approval of HQ USAF or Chief, NGB, as appropriate.*" (Emphasis added)

The Manual in AFM 35-3, para. 2, supplies the following definitions:

"2-7. Air Reserve Forces. The Air Reserve Forces consist of ANGUS and AFRes units and members.

"2-8. Component. A Regular or Reserve component of the Armed Services. ANGUS and AFRes are the USAF Reserve components.

"2-29. Ready Reserve. The Ready Reserve consists of those units and members of the Reserve components liable for AD in time of war, in time of national emergency declared by the Congress or the President, or when otherwise authorized by law. Reserve members not assigned to the Standby or Retired Reserve are placed in the Ready Reserve.

"2-30. Ready Reserve Agreement. A written agreement whereby a member of the Air Reserve Forces, not otherwise obligated for participation as a member of the Ready Reserve, accepts, or retains membership as a Ready Reserve for a specific period of time in order to be eligible for assignment to or retention in a Ready Reserve unit or mobilization position. The member waives his right to transfer to the Standby Reserve under any criteria under which he may be qualified on the date he signs the agreement or on the date of assignment, whichever, is later (chapter 32).

"2-42. Standby Reserve. The Standby Reserve consists of those units or members of the Reserve components liable for AD only in time of war or National emergency declared by Congress, or when otherwise authorized by law. Reserve members not assigned to the Ready or Retired Reserve are placed in the Standby Reserve.

APPENDIX E

READY RESERVE AGREEMENT

I agree to (accept) or (retain) membership in the Ready Reserve for a period to expire on the date of my first annual Military Personnel Record Review (or the date of expiration of my enlistment whichever comes earlier), following the effective date of this agreement.

I certify that I am immediately available for extended active duty (1 in time of war or National emergency declared by Congress; (2)in a National emergency declared by the President, or (3)when otherwise authorized by law. I understand the Air Force can in the event of partial or full mobilization, order me to enter active military service at any time during the period of this agreement. I am fully aware of my eligibility for Standby status under chapter 39, AFM 35-3, and during the period of this agreement, hereby waive my rights to Standby status under any criteria for which I am presently eligible. I understand that:

a. I will not be released from this agreement unless there is a change in my status, and upon such change, I submit a request for transfer to the Standby Reserve and such request is approved under the eligibility criteria established in chapter 39, AFM 35-3.

b. No request for transfer to the Standby Reserve will be accepted after the date of an alert or notice of mobilization.

c. This agreement will become effective on the date indicated above or the date I am officially assigned whichever comes later.

d. This agreement terminates upon reassignment from the *Kansas Air National Guard.*

Signature of Member
(Signed)

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-431

JERRY K. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners brought this action for damages in the Court of Claims, after the United States District Court had ordered their transfer from active military duty to reserve status. Petitioners are former Air National Guard officers who were ordered to active duty on January 26, 1968, pursuant to Paragraph (c), Title I, Public Law 89-687, 80 Stat. 981, authorizing the activation of units of the Ready Reserve. Subsequent to their activation, petitioners

brought suit in the district court, claiming that their call to active service was unlawful, since at the time of the call-up, they were not properly in the Ready Reserve, but in the Standby Reserve. They maintained that the Ready Reserve Agreements which they had signed, by which they agreed to remain in the Ready Reserve for a stated period, had expired prior to January 26, 1968, and had not been renewed. Accordingly, petitioners argued that, upon the termination of their respective agreements, they no longer belonged to the Ready Reserve, and that the Air Force was under an obligation to transfer them immediately to Standby Reserve status.

The district court ordered petitioners transferred to Standby Reserve because the pertinent Air Force Regulation "states that if * * * the member does not renew his Ready Reserve agreement, he will be immediately reassigned to Standby" (Pet. App. C, p. 21). The court of appeals affirmed (Pet. App. B).

Petitioners then instituted the present action in the Court of Claims to recover for the damages they allegedly suffered as a result of their unlawful activation.[1] The Court of Claims dismissed their suit for lack of jurisdiction.

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[1] Petitioners claim damages "for lost wages, retirement credits, job experience and training, employment and advancement opportunities, loss of the society of their families, involuntary risk of their lives, deprivation of property in violation of the 5th Amendment to the United States Constitution, and involuntary servitude in violation of the 13th Amendment to the Constitution" (Pet. App. A, p. 16).

2. The holding of the Court of Claims—that it lacked jurisdiction over the case because, among other reasons, "the claims of the plaintiffs sound in tort" (Pet. App. A, p. 16)—is correct. There is no conflict in decisions, and the issue is not recurrent. Accordingly, further review is not warranted.

In their attempt to establish jurisdiction under the Tucker Act, 28 U.S.C. 1491, petitioners argue (Pet. 10) that their activation, since it came after their Ready Reserve Agreement had expired, constituted a breach by the United States of an express contract —*i.e.*, the Ready Reserve Agreement. In rejecting this contention, the Court of Claims properly pointed out (Pet. App. A, p. 16) that

> [e]ven if it could be said, arguendo, that the agreements imposed obligations on the Air Force, the plaintiffs have no claim for breach of contract because the agreements terminated by their own provisions more than three months before the plaintiffs were called to active duty. In other words, the events of which plaintiffs complain occurred long after their Standby [sic] Agreements had expired. Therefore, the action taken by the Air Force was not a breach of the terminated agreements.

Petitioners were activated in 1968 because the Air Force, contrary to its own regulations, had not transferred them to standby status upon the expiration of their Ready Reserve Agreements. Any injuries petitioners may have suffered as a result of being called to active duty, therefore, are attributable to the

violations of these regulations, and not to any breach of the Ready Reserve Agreement. While the Tucker Act does confer upon the Court of Claims jurisdiction over "any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department * * *" it is settled that jurisdiction only lies under this provision where the "particular provision of law [whether Constitution, statute or regulation] relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport Steamship Corporation* v. *United States*, 372 F. 2d 1002, 1007 (Ct. Cl.).

The regulation involved here merely directs Air Force officials to transfer Ready Reserve members to Standby status upon termination of their Ready Reserve Agreements. It in no way gives members a right to compensation for damages resulting from the Air Force's failure to follow the transfer directive.[*]

Moreover, the failure to act was predicated on an erroneous construction of the regulation. Suits against the United States based on such conduct are expressly prohibited by the Tort Claims Act, 28 U.S.C. 2680 (a). The court below properly determined, there-

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[*] The claim based upon the Thirteenth Amendment is similarly insubstantial. Like the regulation violated by the Air Force, the constitutional provision allegedly violated here contains no "right to be paid a certain sum." *Eastport Steamship Corporation* v. *United States*, *supra*, 372 F. 2d at 1007. This claim is therefore also beyond the jurisdiction of the Court of Claims.

fore (Pet. App. A, p. 17), that it was unnecessary to transfer the case to the district court.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[8] Petitioners also contend that the Court of Claims had jurisdiction because their activation amounted to a taking requiring compensation under the Fifth Amendment. The court below correctly rejected this claim, since petitioners "have not shown that the government has taken any of their property within the meaning of the Fifth Amendment" (Pet. App. A, p. 17).

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